

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LISA R. POLLETT

Claimant

VS.

EMERSON ELECTRIC COMPANY

Respondent

Self-Insured

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Docket No. 199,951

ORDER

Claimant requested review of the Award dated May 7, 1997, entered by Administrative Law Judge John D. Clark. The Appeals Board heard oral argument on October 15, 1997.

APPEARANCES

Patrick C. Smith of Pittsburg, Kansas, appeared for the claimant. Edward D. Heath, Jr., of Wichita, Kansas, appeared for the respondent.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. In addition, the parties have stipulated the value of the insurance benefit provided to claimant as an additional compensation item was \$50 per week. At oral argument the parties announced nature and extent of disability and average weekly wage were the only issues the Appeals Board was requested to address on this review.

ISSUES

The Administrative Law Judge awarded claimant permanent partial disability benefits for a 7.5 percent whole body functional impairment. Claimant requested the Appeals Board to review that finding. The only issues before the Appeals Board on this

review are the nature and extent of claimant's disability for the period from January 12, 1996, to December 1, 1996, and claimant's average weekly wage. Claimant contends she is entitled to a finding of work disability for that period. Respondent, on the other hand, contends claimant's permanent partial disability should be limited to the functional impairment rating because claimant chose to attend school rather than accept respondent's offer of employment.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds as follows:

The Award should be modified.

(1) Claimant developed thoracic outlet syndrome as a result of performing her work for the respondent. The Administrative Law Judge determined claimant's date of accident for computation of her award was October 7, 1994. Although claimant raised date of accident as an issue in her application for Appeals Board review, at oral argument claimant's counsel represented he agreed with the Administrative Law Judge's determination and abandoned date of accident as an issue. Therefore, the Appeals Board finds the appropriate date of accident for purposes of computation of this award is October 7, 1994.

(2) Claimant returned to work for the respondent approximately six weeks after surgery. Claimant worked for respondent until January 12, 1996, when she was laid off. After that layoff, which was claimant's third since returning to work after the thoracic outlet surgery, respondent suggested and recommended a retraining program. Pursuant to that recommendation, claimant enrolled in a one-year course of business and computer classes at Southeast Kansas School of Technology.

(3) In late January 1996, respondent advised claimant it could provide temporary work but respondent did not require claimant to accept that job because she was already enrolled in school. During the summer of 1996, respondent again contacted claimant and offered her a position in the laminations department. Although she had not previously worked in that department, claimant was familiar with the job and did not believe she could perform it because it required heavy lifting and bending. Therefore, claimant chose to continue her vocational technical courses which she completed in January 1997. However, before she completed her courses, claimant obtained a job with a different employer earning as much as when she was injured.

(4) For purposes of computation of this award, claimant's average weekly wage is \$272.80 until January 12, 1996, when it increases \$50 due to the discontinuance of the insurance benefits. For the period between her post-accident return to work and the January 12, 1996, layoff, claimant earned a wage comparable to that which she was earning when she was injured. Between January 12, 1996, and December 1, 1996,

claimant earned nothing as she was unemployed and attending school. Therefore, for the period between January 12, 1996, and December 1, 1996, claimant has a 100 percent difference in pre- and post-injury wages.

(5) As a result of her work-related injury, claimant has medical restrictions of no lifting greater than 20 pounds, no lifting greater than 10 pounds more than occasionally, and no repetitive activities with either hand. According to board-certified neurologist Bernard M. Abrams, M.D., who was the only physician to testify, claimant has sustained a 7.5 percent whole body functional impairment as a result of her work-related injury.

(6) Based upon Dr. Abrams' testimony during cross-examination, claimant has lost the ability to perform 45 percent of the job tasks which she performed in substantial, gainful employment during the 15-year period before her work-related accident.

CONCLUSIONS OF LAW

Because hers is an "unscheduled" injury, claimant's entitlement to permanent partial disability benefits is governed by K.S.A. 44-510e, which provides in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

Claimant contends she is entitled to a 75 percent work disability for the period between January 12, 1996, and December 1, 1996. On the other hand, because respondent offered claimant employment in January 1996 and again later that summer, respondent contends claimant's benefits should be limited to her functional impairment rating for the period in question.

Respondent argues the principles set forth in both Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995) and Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, ___ P.2d ___ (1997), support its contention that claimant is limited to her functional impairment.

The Appeals Board disagrees with the respondent's analysis. Both Foulk and Copeland are premised upon the injured worker's lack of good faith and announced public policy principles to prevent someone from wrongfully manipulating their workers compensation award. In Foulk, the Court held workers could not without justification refuse to attempt to perform an accommodated job in order to increase their workers compensation benefits. In Copeland, the Court cited Foulk and held an injured worker was required to exercise good faith in seeking appropriate employment after an accident.

The Appeals Board finds claimant's decision to complete the one-year vocational technical course was not a wrongful attempt to manipulate her workers compensation award. To the contrary, the Appeals Board finds claimant was justified in declining respondent's offer of a temporary job in order to complete her retraining program. The job offered claimant in January 1996 was only temporary in nature and not expected to last more than a couple of weeks. Further, the job offered claimant later that summer in the laminations department was not appropriate as it was not within claimant's physical capabilities.

Based upon the above, claimant is entitled to a 7.5 percent permanent partial disability for the period she returned to work for the respondent and earned a comparable wage before the January 12, 1996, layoff. Those benefits should be computed using claimant's average weekly wage of \$272.80.

For the period between January 12, 1996, and December 1, 1996, claimant has a 73 percent permanent partial general disability. That conclusion is based upon averaging claimant's 45 percent task loss and 100 percent wage difference as required by K.S.A. 44-510e. Those benefits should be computed using the higher average weekly wage of \$322.80.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated May 7, 1997, entered by Administrative Law Judge John D. Clark should be, and hereby is, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Lisa R. Pollett, and against the respondent, Emerson Electric Company, a qualified self-insured, for an accidental injury which occurred October 7, 1994. For the period before January 12, 1996, and based upon an average weekly wage of \$272.80 claimant is entitled to 6.57 weeks of temporary total disability compensation at the rate of \$181.88 per week or \$1,194.95, followed by 31.13 weeks at the rate of \$181.88 per week or \$5,661.92, for a 7.5% permanent partial disability. For the period from January 12, 1996, to December 1, 1996, and based upon an average weekly wage of \$322.80, claimant is entitled to 46.14 weeks

of permanent partial disability benefits at the rate of \$215.21 per week or \$9,929.79 for a 73% work disability making a total award of \$16,786.66, all of which is due and owing and ordered immediately paid less the amounts previously tendered. Commencing December 1, 1996, claimant's permanent partial disability decreases to 7.5%, but no additional permanent partial disability benefits are due because of the accelerated payment made for the prior periods.

Claimant is entitled to unauthorized medical up to the statutory maximum upon presentation to respondent of proper proof of payment.

Claimant may request future medical benefits upon proper application to the Director.

The remaining orders set forth by the Administrative Law Judge in the Award are hereby adopted by the Appeals Board as its own to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of November 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Patrick C. Smith, Pittsburg, KS
Edward D. Heath, Jr., Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director